UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODNEY BARBER, Plaintiff,	:	
vs.	:	C.A. NO.: 05-390-ML
VERIZON NEW ENGLAND INC., Defendant.	:	

REPLY BRIEF IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Most of the arguments that Plaintiff Rodney Barber ("Mr. Barber") presents in his opposition to the summary judgment motion by Defendant Verizon New England Inc. ("Verizon") are addressed in Verizon's opening memorandum and do not merit a reply. Four points, however, warrant a brief response. First, Mr. Barber's belated argument that he was substantially limited in his ability to play sports does not demonstrate that he was disabled. Second, Mr. Barber cannot establish that Verizon regarded him as substantially limited in the major life activity of working. Third, Mr. Barber has misrepresented the findings of the arbitration panel and mischaracterized Verizon's argument as to the effect of those findings. Fourth and finally, Mr. Barber is not entitled to the discovery he seeks before this Court rules on Verizon's summary judgment motion.

I. MR. BARBER'S ALLEGED INABILITY TO PLAY SPORTS IS NOT A SUBSTANTIAL LIMITATION IN A MAJOR LIFE ACTIVITY.

Mr. Barber does not appear to dispute Verizon's contention that his alleged sleeping problems, fatigue, and nausea fall short of being substantial limitations on a major life activity. However, Mr. Barber now claims that he was substantially limited in "physical activity." This claim fails.

"Physical activity" in and of itself is not a major life activity. *See, e.g., Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc.*, 242 F.3d 610, 615 (5th Cir. 2001); *Baerga v. Hospital for Special Surgery*, 15 A.D. Cas. (BNA) 111, 115 (S.D.N.Y. 2003). The only specific physical activities that Mr. Barber identifies are playing football and softball, which he claims to have stopped playing when he was diagnosed with hepatitis. Memorandum of Law In Support of Objection to Defendant's Motion for Summary Judgment ("Plaintiff's Opp."), at 5. These are not activities that are of central importance to most people's daily lives, as required by *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, 534 U.S. 184, 1997-98 (2002). In fact, several courts have reached just the opposite conclusion. *See, e.g,., Bear v. Exxon Mobil Corp.*, 16 A.D. Cas. (BNA) 607, 612 (E.D. La. 2004) (recreational sports are not major life activities); *Munck v. New Haven Sav. Bank*, 251 F. Supp. 2d 1078, 1083-84 (D. Conn. 2003) (inability to play volleyball was not substantial limitation in major life activity); *O'Dell v. Altec Indus.*, 4 A.D. Cas. (BNA) 1776, 1778 (W.D. Mo. 1995) (inability to bowl, bike, and play football did not create dispute of fact as to substantial limitation of a major life activity).

II. VERIZON DID NOT REGARD MR. BARBER AS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING.

Mr. Barber also contends that even if he was not actually disabled, Verizon regarded him as such. Specifically, Mr. Barber argues that Verizon viewed him as substantially limited in the major life activity of working.

It is not enough that an employer regard an employee as having an impairment. An employee can only state a claim for a "perceived disability" if the employer believed the employee was substantially limited in a major life activity. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999); *Tardie v. Rehabilitation Hosp. of R.I.*, 168 F.3d 538, 541-42 (1st Cir. 1999). Where working is the major life activity at issue, an employee must be able to show that the employer believed that he was "significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs* in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). Merely being aware of an employee's impairment is not enough. *Tardie,* 168 F.3d at 542.

Mr. Barber cannot make this showing. There is no evidence that Verizon regarded Mr. Barber as unable to perform a wide range of jobs or an entire class of jobs, nor does Mr. Barber direct the Court to any alleged facts from which such a conclusion reasonably could be drawn. In fact, Verizon never called into question Mr. Barber's *ability* to perform the duties of his job.[1] What Verizon did question was Mr. Barber's *honesty* and *integrity* in traveling to Las Vegas for a wedding, without notice to or permission from the disability carrier, when he was supposed to be on disability leave. Mr. Barber cannot construct a "perceived disability" claim on such a foundation.

III. THIS COURT CAN CONSIDER THE FINDINGS OF THE ARBITRAL PANEL.

Mr. Barber spends over two pages arguing that the findings of the arbitral panel are not binding on this Court. It is difficult to understand why Mr. Barber does this, as Verizon made exactly the same point in its opening memorandum. *See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment, at 11 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974)). The fact that this Court is not *bound* by the arbitrators' findings, however, does not mean it may not *consider* them. In fact, the Supreme Court has stated that the factual findings of an arbitral panel are particularly relevant "where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *Id.* at 60 n.21. Mr. Barber cites no authority to suggest otherwise.

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[1] Mr. Barber has suggested that *after* his termination and subsequent reinstatement, his supervisor expressed doubts about his willingness to work night shifts. Apart from the fact that occurrences after his reinstatement are irrelevant, such a statement by Mr. Barber's supervisor, even if it could be proven, would not demonstrate that Verizon thought Mr. Barber was precluded from working in a wide range of jobs. At most, it would show a belief that Mr. Barber could not work that particular subset of jobs at Verizon that required night shifts. *See Tardie,* 168 F.3d at 542 ("regarded as" claim not established where employer merely believed plaintiff could not work jobs requiring more than 40 hours per week). That is not enough to show that Verizon regarded Mr. Barber as substantially limited in the major life activity of working.

Mr. Barber implies that the Court should not consider the panel's findings because their decision was not unanimous.[2] Mr. Barber misstates the record. The panel was, in fact, unanimous in its conclusion that Mr. Barber knowingly committed an egregious violation of Verizon's policies. The Union-appointed arbitrator simply expressed his belief that Mr. Barber should have been awarded back pay because, in his view, Verizon had not proven that it terminated each and every employee who ever had violated this policy. *See* Plaintiff's Exh. 13. In other words, he did not believe Verizon had "just cause" to terminate Mr. Barber under the collective bargaining agreement – a standard that Verizon is *not* required to meet here.

The panel was unanimous in its conclusion that Mr. Barber's decision to travel to Las Vegas without seeking permission was "particularly and uniquely flagrant" and warranted severe punishment. Defendant's Statement of Undisputed Facts, ¶ 46. That finding is powerful evidence in support of Verizon's position that its termination of Mr. Barber was for legitimate, non-discriminatory reasons. As Verizon already has argued, Mr. Barber offers no competent evidence that could support a contrary finding – a fatal flaw that entitles Verizon to summary judgment.

IV. MR. BARBER IS NOT ENTITLED TO ADDITIONAL TIME TO CONDUCT DISCOVERY.

Finally, Mr. Barber argues that he should be allowed additional discovery before the Court rules on Verizon's summary judgment motion. Specifically, he seeks an unspecified

[2] This argument is ironic, since it was Mr. Barber's counsel who, at the status conference, was pressing the Court to see if he could use the arbitrators' findings in his opposition to Verizon's summary judgment motion.

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amount of additional time to depose six identified, and some undetermined number of unidentified, individuals.

To begin with, none of the discovery that Mr. Barber seeks will advance the ball on the issue of whether his hepatitis constitutes a disability within the meaning of FEPA and RICRA.[3] Of the potential deponents Mr. Barber has identified, only his ex-wife, Kara Graham, possibly could have testimony relevant to that inquiry, and her testimony would not suffice to defeat summary judgment. Ms. Graham might, indeed, provide some corroboration of Mr. Barber's claims relating to sexual performance and having children. On the other hand, her testimony would do nothing to cure a more fundamental problem – Mr. Barber has no evidence linking these alleged limitations to his hepatitis. For that, Mr. Barber would need competent, expert medical testimony. He has proffered none (nor could he, as a practical matter, given the ruling on Verizon's Motion to Preclude Plaintiff's Experts). In the absence of that critical link, Ms. Graham's testimony could not possibly allow Mr. Barber to survive summary judgment. *See Resolution Trust Corp. v. North Bridge Assocs., Inc.*, 22 F.3d 1198, 1206 (1st Cir. 1994) (in order to prevail on Rule 56(f) request, the party opposing summary judgment must "present[] a plausible basis for a belief that discoverable materials exist that would likely suffice to raise a genuine issue of material fact and, thus, defeat summary judgment.").

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[3] Even if Mr. Barber could overcome that hurdle, the discovery he seeks from individuals other than his ex-wife are of little or no value in his effort to prove that Verizon acted with discriminatory animus. Mr. Barber proposes deposing Sandra Hurt, the other employee who was fired for going to Las Vegas while on disability. However, there is no dispute that Ms. Hurt went on the trip, that she was on a disability leave at the time, that she did not get permission to travel, and that she was terminated. None of those facts helps Mr. Barber prove his case; on the contrary, they support Verizon's position. In addition, Mr. Barber asserts that the president and business manager of the Union would know of other employees who traveled while on disability and were not terminated, but he offers nothing to suggest that these individuals would be testifying based on personal knowledge. Moreover, there is no indication that these Union officials would know anything about the medical conditions of other employees, and without that information, any comparison between their treatment and that of Mr. Barber would be meaningless. Finally, Mr. Barber expresses his desire to depose his former supervisor, Mr. Paolino, and a MetLife representative, Mr. Welling, but he offers little in the way of explanation as to their expected testimony. At most, it appears he would expect them to discuss the severity of Mr. Barber's punishment and the process by which Verizon confirmed with MetLife that Mr. Barber had not received permission to travel. However, the latter point is undisputed, and as to the former, Mr. Barber states that "David Paolino told Plaintiff that he had never seen a matter such as this." Plaintiff's Opp., at 8. If, indeed, Mr. Paolino had no experience with cases similar to Mr. Barber's, there is nothing that he will be able to add to Mr. Barber's argument that his termination for traveling without permission was merely a pretext for discrimination.

Furthermore, the First Circuit has described Rule 56(f) (which Mr. Barber never mentions in his brief) as "a method of buying time for a party who, when confronted by a summary judgment motion, can demonstrate an authentic need for, and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition." *North Bridge*, 22 F.3d at 1203. While motions under Rule 56(f) should be construed "generously, … [t]his does not mean … that Rule 56(f) has no bite or that its prophylaxis extends to litigants who act lackadaisically …. In other words, Rule 56(f) is designed to minister to the vigilant, not to those who slumber upon perceptible rights." *Id.* In fact, "a party must invoke Rule 56(f) within a reasonable time following receipt of a motion for summary judgment." *Id.* at 1204.

Assuming generously that Mr. Barber's requests for additional discovery in his brief are the equivalent of a Rule 56(f) motion, those requests were not made "within a reasonable time following receipt of [Verizon's] motion for summary judgment." *Id.* At the status conference on September 6, Verizon's counsel specifically stated the grounds upon which Verizon would seek summary judgment. Given the Court's decision at the status conference to suspend discovery, the need for a prompt Rule 56(f) motion should have been readily apparent to Mr. Barber's counsel. Mr. Barber did not file such a motion, however, despite the fact that nearly a month went by before Verizon filed its summary judgment motion. Mr. Barber then had nearly three weeks to consider Verizon's summary judgment motion before his opposition was due, but he did not file a Rule 56(f) motion during that time, either.

Mr. Barber could and should have spelled out long ago his need for the discovery he now seeks. There is no reasonable excusive for having waited so long to do so, and on that basis alone the Court should deny his request for additional time to conduct discovery. *See Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 92-93 (1st Cir. 1996) (denying Rule 56(f) motion where, among other reasons, plaintiffs "filed their original opposition to summary judgment motion without previously informing the court of their inability to properly oppose summary judgment due to incomplete discovery" and were dilatory in pursuing discovery before summary judgment).

Mr. Barber's lackadaisical approach to discovery in this case also argues against his request for additional discovery now. For eight months after the filing of the amended complaint, Mr. Barber's counsel requested several discovery extensions but gave no indication that he wished to take depositions. Finally, in mid-August 2006 – less than two months before the now-extended close of discovery and at the height of summer vacation season – Attorney Gladstein sent a letter to Verizon's counsel requesting *20 depositions* to take place over the next four weeks. He then refused Verizon's requests to reduce the number of depositions – indeed, refused any compromise at all – necessitating the involvement of this Court. Had Attorney Gladstein been remotely cooperative during the discovery period, much time, trouble, and delay likely could have been avoided. He should not be allowed to engage in such dilatory tactics and then further delay these proceedings by asking for extensive discovery out of time.

Moreover, Mr. Barber has not attempted to explain why he could not have obtained affidavits from the witnesses he now wants to depose, or what efforts, if any, he undertook to get affidavits. While it is safe to assume that Mr. Paolino, who still works for Verizon and whom Mr. Barber has accused of discrimination, and Mr. Welling, who works for MetLife, would not provide affidavits, it is far from clear why Mr. Barber could not have obtained affidavits from the others. According to his own affidavits, Mr. Barber has spoken to his ex-wife, Ms. Graham, and the Union's business manager, William McGowan, and they have shared with him the information he believes would come out in a deposition. While he has not submitted an affidavit concerning the Union president, Mr. Barber's brief strongly suggests that he has spoken to the president, as well. As for Sandra Hurt, who was among the group of Verizon employees who went to the Las Vegas wedding and who was fired for the same reason as Mr. Barber, it is hardly far-fetched to assume that Mr. Barber could have obtained an affidavit from her, as well.

In short, Mr. Barber has not met the requirements for taking additional discovery before the Court rules on Verizon's summary judgment motion.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 2nd day of November, 2006, I caused a copy of the foregoing to be served by first-class mail on:

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